IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 1106 of 2022

B E T W E E N:

VIVIEN JIT SIEN YAP

First Applicant

and

EMPIRE SONS (AUSTRALIA) PTY LTD T/AS RAY WHITE (DALKEITH CLAREMONT) (ABN 41 604 259 145)

Second Applicant

SANDI MATIC

Contemnor

APPLICANTS' SUBMISSIONS AS TO PENALTY FOR CIVIL CONTEMPT

Allocated Judge:	Justice Solomon
Date of Document:	23 November 2022
Filed on behalf of:	Applicants
Date of Filing:	23 November 2022

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1 By the judgment delivered 27 October 2022 published 1 November 2022 this Honourable Court held the contemnor Sandy Matic in contempt of Court – see *Yap v Matic [No 3]* [2022] WASC 370.

2 The Applicants make these submissions to assist the Court in determining penalty.

3 The factors relevant for consideration by the Court were set out in *Chief Executive Officer, Department of Environment and Conservation v Szulc [No 2]* [2011] WASC

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315 and were further considered by this Honourable Court in *State of Western Australia v Galati [No 4]* [2017] WASC 162 (copies of these cases are attached).

4 Both decisions of this Honourable Court applied the decision of Dunford J in *Wood v Staunton [No 5]* (1996) 86 A Crim R 183 of 185. These were summarised by Justice Tottle in *Galati* at [34].

5 The nine factors are:

5.1 the nature and seriousness of the contempt proved;

5.2 the consequences of the contempt;

5.3 the context in which the contempt was committed;

5.4 the reason for the contempt including whether the Contemnor intended subjectively to commit the contempt;

5.5 any benefit received by the Contemnor;

5.6 whether there has been any apology or public expression of contrition;

5.7 the circumstances, character and antecedence of the Contemnor;

5.8 general and personal deterrence; and

5.9 denunciation of the contempt.

6 The Applicants address each of these nine matters in turn.

<u>The nature of the contempt</u>

6.1 The contempt committed by the Contemnor was to breach an injunctive order requiring him amongst other things not to threaten Ms Yap. The findings of this Honourable Court are that the email sent by Mr Matic on 16 March 2022 constituted in the context of the dispute "a very menacing threat…." [15].

The consequence of the contempt

6.2 The Court identified [15] that the contempt "appeared to be advanced by the Defendant in an effort to intimidate Ms Yap to drop the proceedings". If that was the intended objective, then it failed. The consequence however was deposed to by Ms Yap in her second affidavit of 25 March 2022. This Court accepted that the consequence of the threat was "very significant" affecting Ms Yap's "life, her health and her anxiety";

The context in which the contempt was committed

6.3 The context involved failed attempts by Mr Matic to set aside the injunctive orders made this Honourable Court in circumstances where Mr Matic contended that the making of orders by this Court had had a significant effect on, amongst other things, his ability to rent property and the like;

The reason for the contempt

6.4 Mr Matic has given no sensible nor persuasive answer as to why he committed the contempt. He did not attend the hearing at which this Honourable Court found his conduct constituted a contempt of Court. This was a deliberate act on his part, not to attend;

Benefit received by the Contemnor

6.5 The Applicants do not identify any benefit received by the Contemnor.

Whether there has been any apology or public expression of contrition

6.6 No directly relevant apology has been given by the Contemnor. The Applicants draw the attention of the this Honourable Court to the public notice published in the West Australian Newspaper on Tuesday, November 22 at page 47 (copy attached). In so far as that is an apology to the Honourable Justice Solomon it is not an apology to the Applicants nor to the Court. It is to be noted that the publication of an apology by Mr Galati which was relevantly

considered by Justice Tottle was a large publication in the West Australian Newspaper, not a small public notice published in the West Australian Newspaper.

Circumstances, character and antecedents of the Contemnor

6.7 The Applicants make no submission in this regard.

General and personal deterrence

6.8 The Applicants rely on the affidavit evidence filed before this Honourable Court that shows that the Contemnor still continues to act to the Court and to Counsel for Ms Yap in a manner that indicates he considers himself to be outside the authority of this Honourable Court.

6.9 Chief Justice Martin in *Szulc* at [70] commented "*general deterrence is significant…because it has to be made clear to people in Mr Szulc's position that orders made by this Court for the protection…are orders which must be obeyed, that the Court will not countenance breaches of this kind and will punish breaches of the orders of the Court that are made for the purpose of the protection…General deterrence is of particular significance in cases like these in which unlawful conduct having an adverse effect…has been undertaken deliberately, with knowledge of the illegality for the purpose of commercial gain or benefit*." In this case it is of significant importance to the Applicants that the Court make plain that orders made for the protection of individuals must be obeyed and that the Court will not countenance breaches of protective orders such as the orders made to protect Ms Yap. In so far as personal deterrence is concerned, it is of fundamental importance that Mr Matic receive a clear statement from the Court that "*he must obey the law and must obey the authority of the Court*" [71].

6.10 The High Court in *Australasian Meat Industry Employee's Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at [107] adopted a passage from Borrie & Lowe's *Law of Contempt* "*if a Court lacked the means to enforce its orders, if its orders can be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought in disrepute*".

Denunciation of contempt.

6.11 It is of vital importance for the administration of justice that the Court denounce emphatically the conduct of the Contemnor and show the Court's disapproval of that conduct.

Submission as to penalty

7 Having regard to the factors set out above, the Court should impose a custodial sentence. It is unlikely that a fine will be paid – the correspondence directed to Registrar Nelson of this Honourable Court indicates that the Contemnor does not accept liability to pay the costs of the Applicants in the proceedings.

8 The seriousness of emphasising to the public that protective injunction orders must be complied with is such that an appropriate custodial term is 90 days.

"M.L. Bennett"

M L BENNETT
COUNSEL

List of Authorities

Case Authorities

1 *Chief Executive Officer, Department of Environment and Conservation v Szulc [No 2]* [2011] WASC 315

2 *State of Western Australia v Galati [No 4]* [2017] WASC 162

3 *Yap v Matic [No 3]* [2022] WASC 370

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Tenders can be lodged in the Tender Box at the Shire of Meekatharra Administration Centre or emailed to ceo@meekashire.wa.gov.au.

Please direct any technical enquiries to the Shire's Works and Services Manager by emailing workamgr@meekashire.wa.gov.au.

Tender submissions addressed to the CEO at the address close at 4.00pm Tuesday 13 December 2022 clearly marked with the above RFT number and addressed as follows:

KJ Matthews
Chief Executive Officer
Shire of Meekatharra
PO Box 170
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Public Notices

DECEASED ESTATES

TRUSTEES ACT 1962
AS AMENDED, SECTION 63

- Joan Elva Goldthorpe late of 22 Wheatcroft Street, Scarborough, Western Australia, deceased.
- Creditors and other persons having claims (to which Section 63 of the Trustees Act, 1962, relates) in respect of the estate of the deceased, who died on 10 May 2022 are required by the personal representative, John Stuart Goldthorpe, to send particulars of their claims to him c/- Zafira Legal of Level 10, 140 St Georges Terrace, Perth WA 6000 by the date one (1) month from the publication date of this notice, after which date the executor may convey or distribute the assets having regard only to the claims of which he then has notice.

IRDI Legal as solicitors for the personal representative.

TRUSTEES ACT 1962
Deceased Estates
Notice to Creditors and Claimants

Joan Yvonne Campbell late of 94 Kitchener Road, Alfred Cove, Western Australia, deceased. Creditors and other persons having claims (to which Section 63 of the Trustees Act 1962 relates) in respect of the estate of the deceased, who died on the 21st of June 2022, are required by the executors Lise Belle Shepherd and Evan Whelan Wyllie to send the particulars of their claims to Lise Belle Shepherd c/- Evan Whelan Road, Kardinya, Western Australia, 6163, within one (1) month of the date of publication of this notice after which date the executors may convey or distribute the assets, having regard only to the claims of which they then have notice.

TRUSTEES ACT 1962
Notice to Creditors and Claimants

Estate of Kathleen Ann Dyson late of 68 Falstaff Close, Greenfields in the State of Western Australia.

Creditors and other persons having claims (to which section 63 of the Trustees Act 1962 relates) in respect of the estate of the deceased, who died on 15 March 2022, are required by the Executor/Administrator, Jacobus Johannes de Klerk, of 97 Challenger Road, MADORA BAY, in the State of Western Australia, to send particulars of their claims to him within one month from the date of publication of this notice, after which date the Executor may convey or distribute the assets, having regard only to the claims of which they then have notice.

Dated: 17 November 2022

LEGACY LEGAL WA
97 Challenger Road
MADORA BAY WA 6210
Ph: 08 9527 2624
Contact Johan de Klerk

DECEASED ESTATES

TRUSTEES ACT 1962
Notice to Creditors and Claimants

Donald Ian Leung late of 28 Foundry Court, North Fremantle, the State of Western Australia, Business Proprietor, deceased.
Creditors and other persons having claims (to which Section 63 of the Trustees Act 1962 relates) in respect of the estate of the deceased, who died on 15 September 2022 are required by the joint executors Timothy Harry Leung and Peter Donald Leung to send particulars of their claim to Zafira Legal of Level 10, 140 St Georges Terrace, Perth WA 6000 by the date one (1) month from the publication date of this notice, after which date the executor may convey or distribute the assets having regard only to the claims of which he then has notice.

GENERAL

ANNUAL GENERAL MEETING
Perry Lakes Hawks Basketball Assn. (Inc.)
To be held at 6.30pm on Wednesday 30th November 2022 at Bendat Basketball Centre. Agenda:
President's report; Directors reports,
Financial report
Election of Directors
Notice of Motions
Other business
J. Purser Administrator

NOTICE OF APOLOGY TO THE HON. JUSTICE SOLOMON
I, Sandi Matic, hereby NOTICE; I, Acted in a manner that was not honourable when attending the court at which you were presiding and subsequent email correspondence regarding His Honour.
I, Apologise to you for the manner in which I behaved.
I, Sandi, as a living private man, will attend future court invitations under special appearance in order to settle any outstanding claims before the court.
p.p. SANDI MATIC

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Supreme Court of Western Australia

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF ENVIRONMENT AND CONSERVATION -v- SZULC [No 2] [2011] WASC 315 (17 November 2011)

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF ENVIRONMENT AND CONSERVATION -v- ⇦ SZULC ⇨ [No 2] [2011] WASC 315 (17 November 2011)

Last Updated: 17 November 2011

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CIVIL

CITATION : CHIEF EXECUTIVE OFFICER, DEPARTMENT OF ENVIRONMENT AND CONSERVATION -v- ⇦ **SZULC** ⇨ [No 2] [2011] WASC 315

CORAM : MARTIN CJ

HEARD : 11 NOVEMBER 2011

DELIVERED : 11 NOVEMBER 2011

PUBLISHED : 17 NOVEMBER 2011

FILE NO/S : CIV 2722 of 2009

BETWEEN : CHIEF EXECUTIVE OFFICER, DEPARTMENT OF ENVIRONMENT AND CONSERVATION

Plaintiff

AND

MAXWELL JAN ⇦ **SZULC** ⇨

Defendant

Catchwords:

Criminal law - Contempt of court for breach of injunction of the court by clearing land - Turns on own facts

Legislation:

Environmental Protection Act 1984 (WA)

Sentence Administration Act 2003 (WA)

Sentencing Act 1995 (WA)

Result:

Convicted of two acts of contempt of court

Committed to prison for terms of 9 months and 15 months, to be served concurrently

Category: A

Representation:

Counsel:

Plaintiff : Mr R M Mitchell SC & Ms F B Seaward

Defendant : In person

Solicitors:

Plaintiff : State Solicitor's Office

Defendant : In person

Case(s) referred to in judgment(s):

MARTIN CJ:

(This judgment was delivered extemporaneously on 11 November 2011 and has been edited from the transcript.)

Reasons for conviction

1 The Chief Executive Officer of the Department of Environment and Conservation (the CEO) has brought two motions alleging contempt of court by Mr Maxwell Jan ⇦ **Szulc** ⇨ who is the defendant in these proceedings.

2 The first motion, described by counsel for the CEO as the second application (because it is the second occasion upon which the CEO has brought contempt proceedings against Mr ⇦ **Szulc** ⇨) dated 17 January 2011, seeks an order that Mr ⇦ **Szulc** ⇨ be committed for

contempt of court for failing to comply with an interim clearing injunction granted pursuant to s 51S of the *Environmental Protection Act 1984* (WA) on 8 October 2009, and amended on 2 November 2009, in respect of the land at lot 997 on plan 21197, being the whole of the land contained in certificate title vol 199 folio 30A (which I will describe as 'the farming property').

3 It is alleged that Mr ⇦ **Szulc** ⇨ has failed to comply with the clearing injunction by causing or allowing native vegetation on the farming property to be killed or destroyed and, in particular, that on a date unknown between 24 October 2010 and 30 November 2010, areas that had been cleared on the property prior to the granting of the clearing injunction were again ploughed.

4 I will deal with this application before turning to what counsel for the CEO describes as the third application, which is an application dated 27 May 2011.

5 Prior to these proceedings being commenced, notices relating to the maintenance of vegetation on the farming property had been served on Mr ⇦ **Szulc** ⇨. A soil conservation notice was served upon Mr ⇦ **Szulc** ⇨ in 1994 and at or about the same time as these proceedings were commenced on 23 September 2009, a vegetation conservation notice was served upon Mr ⇦ **Szulc** ⇨.

6 In these proceedings, on 8 October 2009, I made an order that until the trial of the action or further order, Mr ⇦ **Szulc** ⇨ be restrained, and a clearing injunction be granted restraining Mr ⇦ **Szulc** ⇨, from causing or allowing the killing or destruction of, the removal of, the severing or ringbarking of trunks or stems of, or the doing of any other substantial damage to native vegetation on the farming property, including by ploughing, raking, or burning areas cleared in 2009, except in accordance with a clearing permit and soil conservation notice F728801, which is the conservation notice to which I have referred and which was annexed to the order.

7 On 2 November 2009, that injunction was slightly varied by me to authorise the clearing of a sixmetre wide firebreak on the external boundaries of the property. Proceedings for breach of that order were brought by the CEO, and that is what counsel for the CEO has described as the first application. Those proceedings were determined by me on 26 July 2010 (***Chief Executive Officer, Department of Environment and Conservation v*** ⇦ ***Szulc*** ⇨ [2010] WASC 195). In the reasons which I gave on that occasion, I have set out the principles which I take to govern proceedings of this kind. I adopt by reference those principles without necessarily restating them.

8 Relevant to these proceedings, and what I must remind myself, is that the allegation brought by the CEO is to the effect that Mr ⇦ **Szulc** ⇨ has committed a deliberate breach of an order of the Court. 'Deliberate' in this context means wilful in the sense of actions which were not casual, accidental or unintentional.

9 The proceedings, although perhaps technically characterised as civil proceedings, are criminal in nature, with the result that all of the principles of the criminal law apply to the resolution of these proceedings. Those principles include the principle that the CEO must prove the allegation of contempt beyond a reasonable doubt and that the CEO at all times

carries the burden of proof, and that the standard of proof is the highest known to the law. The general principles of the criminal law relating to proof of knowledge require the CEO to prove that Mr **Szulc** had knowledge of the facts which render his actions a breach of the order and, of course, requires the CEO to prove beyond reasonable doubt that the actions that the CEO asserts were a breach of the order were taken by Mr **Szulc**, or that he caused them to occur, and that they were not casual, accidental, or unintentional.

10 The CEO relies upon the following evidence to discharge that burden of proof. I first refer to the earlier affidavit evidence of Mr Craig Stephen Jaques, who is an officer of the Department of Environment and Conservation which provided the basis for the finding of contempt which I made on 26 July 2010.

11 In very general summary of that evidence, it established to my satisfaction and to the requisite standard that, notwithstanding the injunction which I had ordered in October and the variation which I had ordered in November of the previous year, of which Mr **Szulc** was aware, Mr **Szulc** had undertaken the clearing of 42 ha of native vegetation on the farming property and some additional areas had also been burnt and cleared. I sentenced Mr **Szulc** to 3 months imprisonment with the result that he would have been released in or about late October 2010.

12 A further affidavit of Mr Jaques of 21 December 2010 is relied upon in relation to what we are calling the second application. Mr Jaques deposes and I accept, there being no evidence to the contrary, that on 30 November 2010 he attended the farming property owned by Mr **Szulc** and registered in the name of Mr **Szulc** and his former wife in the company of other officers of the department, being Mr Wright, Mr Rayner and Ms Waters.

13 Mr Jaques arrived at the property at approximately 10.15 am and observed Mr **Szulc** working on a vehicle at the front of his house. Mr Jaques walked over to Mr **Szulc** and had a brief conversation with him in which he explained to Mr **Szulc** that he intended to conduct an inspection of the vegetation at the property.

14 Mr Jaques explained to Mr **Szulc** that the inspection had been discussed in court earlier that year. I take that to be a reference to the discussion in court in the course of these proceedings to the effect that the CEO proposed to undertake inspections to ascertain the extent to which native vegetation had been permanently damaged as a result of the clearing work undertaken by Mr **Szulc**, and in particular the extent to which regrowth of native vegetation would occur despite the land having been cleared.

15 After that conversation, Mr **Szulc** asked Mr Jaques for a copy of the court transcript but Mr Jaques replied that he did not have it with him. Mr **Szulc** then requested that Mr Jaques and the others who were with him leave the property and indicated that he would call the police.

16 Mr Jaques and the other officers then left the property and returned at approximately 1.30 pm that day in the company of police officers Spicer and Harrison from the Ravensthorpe

police station. There were some conversations between those police officers and Mr **Szulc** after which the police left the property.

17 Mr Jaques then travelled to the western boundary of the property to an area that he had observed on 23 December 2009 and 10 May 2010 as being one of the areas that had been cleared in 2009. Within that area, Mr Jaques observed a mixture of regrowth, cropped areas and recently ploughed ground. He could tell that the ground had been recently ploughed because the ground contained plough and tyre marks and cleared vegetation lying on the surface was still green in colour. After a number of weeks, cleared vegetation changes colour to brown as it dries out, as Mr Jaques observes. Rainfall also would compact the soil surface and wash away tyre and plough marks. That is the basis for Mr Jaques' conclusion that the ground had been recently ploughed. Mr Jaques observed that the areas that had been recently ploughed had resulted in the additional removal and clearing of native vegetation which had been regrowing within the area cleared in 2009.

18 The majority of the vegetation which had been removed as a result of the activity which Mr Jaques concluded had been undertaken was a small purple flowering native plant. Mr Jaques observes that the plant is a fire ephemeral, meaning it is a shortlived native plant that germinates after fire or physical soil disturbance from seed contained within the soil. Mr Jaques took photographs of the area which he observed and which are in evidence and which confirm to me the observations which he has described in his affidavit. As Mr Jaques states in his affidavit, those photographs show regrowing native vegetation next to recently ploughed ground. Mr Jaques estimates that several hectares of ground in the area in which he made these observations had been ploughed which had resulted in the clearing of native vegetation regrowth.

19 Mr Jaques then travelled to other areas of the property where he helped Ms Waters establish quadrats for the purpose of measuring and recording vegetation species composition within the area of those quadrats.

20 After doing that Mr Jaques travelled to the eastern boundary of the property, then south along the fence line and then to the centre of the property where he had observed that clearing had been undertaken when he visited the property on 23 September 2009. Within that area Mr Jaques observed a recently ploughed area which he estimates was approximately 20 ha in area. Mr Jaques observed that the soil within that area had been turned over with a plough and numerous small native plants including native eucalyptus regrowth had been removed from the ground and were left lying on the surface. Most of the plants that had been removed from the ground were still green in colour, which indicated to Mr Jaques that the clearing of those native plants had occurred within the last week or two.

21 Later Mr Jaques used a global positional system, or GPS, to record the location of the photographs that he took during the course of his visit. Using GPS coordinates he produced a map, which is in evidence, showing the approximate locations where native vegetation had been cleared by ploughing the ground. Based on his observations, and using the GPS coordinates he had plotted, he again estimated that at least 20 ha of native vegetation regrowth had recently been cleared by ploughing. The map which Mr Jaques has prepared

is in evidence. Overlayed onto that map are the previously cleared or ploughed areas identified during his previous inspections.

22 Mr Jaques also deposes, and I accept, that he undertook a search of all records maintained by the Department of Environment and Conservation with respect to applications for and the grant of clearing permits. Having undertaken a search of those records, he states that he was unable to identify any entry recording either any application for a clearing permit having been made or granted to Mr ⇦ **Szulc** ⇨ or any application being made or granted in respect of the farming property.

23 The CEO also relies upon the affidavit of Mr Adam Brett Rayner who, as I have mentioned, was one of the officers who accompanied Mr Jaques on the visit to the property which occurred on 30 November 2010. In the course of his visit to the property, Mr Rayner travelled in company with Mr Jaques to a location further south of the area which they went to initially, being the area in the centre of the property described by Mr Jaques. There Mr Rayner observed a freshlyploughed area where there was a distinct line between the soil which had previously been ploughed and the newly ploughed soil. Mr Rayner states that within the area he observed the soil was dry and friable, there was no evidence of rain having fallen on it and small native plants including eucalyptus regrowth were lying on the ground, most of those plants still being green in colour.

24 The CEO also relies upon the affidavit of Ms Julie Louise Waters who was, as I have mentioned, one of the group that visited the property on 30 November 2010.

25 The primary purpose of Ms Waters' visit was to establish the quadrats and undertake the survey of the regrowth to which I have already referred. Ms Waters' affidavit contains a report which she prepared following her undertaking of that work and the survey of regrowth which establishes that in the areas that are not the subject of these proceedings, that is, the areas that had not been recently disturbed, there was significant native vegetation regrowth.

26 Ms Waters states that from her observations of vegetation at the property she identified native vegetation returning to many of the areas that had been cleared in 2009 and 2010. She observed that regeneration of native vegetation was greatest within the least disturbed area, that is, areas that have not been seeded to crop or recently ploughed. The regrowth of native vegetation within the areas that had been ploughed and cropped demonstrated to her that a viable seed bank remained within the soil. She concluded that if further cropping and ploughing was not conducted within the previously cleared area native vegetation would return, albeit with some loss of species' diversity.

27 The CEO also relies on an affidavit of Mr Malcolm Robert Wright who, as I have mentioned, was amongst the group that visited the property on 30 November 2010. Mr Wright states that he first travelled to an area near to the western boundary of the property where he observed some regrowth amongst the cropped areas. At that location he assisted Ms Waters to establish quadrats and to count the plant species therein. He then travelled to a location towards the centre of the property where he observed that regrowth appeared to be recovering well. He again assisted Ms Waters to establish quadrats and count plant

species. He then travelled to a southern location on the property where he observed a freshly ploughed area within which the soil was loose and friable and small plants, still green in colour, were lying on the ground. Due to the ploughing, no quadrat was established in that area. Finally, he states that he travelled to the southeastern corner of the property where he observed regrowth to be recovering well and assisted in the establishment of another quadrat.

28 That completes the evidence relied upon by the CEO in relation to the second application.

29 I will now set out the evidence and the findings that I make in relation to what we are calling the third application. That is an application brought by the CEO and dated 27 May 2011. In that application the CEO seeks an order that the defendant be committed for contempt of court for failing to comply with the interim clearing injunction to which I have earlier referred. It is alleged that Mr ⇦ **Szulc** ⇨ has failed to comply with the clearing injunction by causing or allowing native vegetation on the property to be killed or destroyed, and in particular, on a date unknown between 30 November 2010 and 18 May 2011 it is alleged that an area containing native vegetation and comprising approximately 40.4 ha was either burnt, ploughed or burnt and ploughed, this area having previously been cleared between 9 October 2009 and 10 May 2010.

30 The affidavits relied upon in support of the third application include another affidavit of Mr Jaques. Mr Jaques deposes in that affidavit that upon 4 February he obtained a report from the Firewatch Project that a fire had been detected at the property the subject of these proceedings within the last 12 hours. He then obtained Landsat images, one dated 13 January 2011 and another dated 22 February 2011. As a result of comparing those images he observed significant changes in vegetation cover in the south-western part of the farming property. Attached to Mr Jaques' affidavit is a copy of the landsat images to which I have referred which confirm that observation.

31 Mr Jaques states in his affidavit, which I accept, there being no evidence to the contrary, that on 18 May 2011 he attended the property with officers of the Department of the Environment and Conservation, being Ms O'Brien and Mr Rayner, and with officers of WA Police.

32 He arrived at the property at about 10.15 am and went to the house on the property and knocked on the door, but there was no answer. He then travelled to the western boundary of the property and then south to a partlycleared area that he had observed on his earlier visits. About that time WA Police officers left the property.

33 Mr Jaques states that during his previous inspection on 30 November 2010 he had observed dense native vegetation covering the ground in that area, but the taller trees had been pushed over. On 18 May 2011 he observed that all of the native vegetation had been burnt and that some of the areas had also been ploughed. He observed that most of the area now contained bare soil scattered with burnt stumps and small native bushes.

34 Mr Jaques has attached to his affidavit a true copy of 14 photographs which depict the area that had been burned. They confirm Mr Jaques' assertion that there was blackened soil together with blackened stumps and bushes as a result of the fire. Mr Jaques estimated that an area of approximately 26.7 ha had been burnt, resulting in the further removal and destruction of native vegetation. Mr Jaques has also attached to his affidavit copies of six photographs which depict the burnt and ploughed areas. Like the other photographs they show blackened stumps, ploughed ground and small plants regrowing.

35 Mr Jaques estimated that another area of approximately 13.7 ha of native vegetation had been burnt and ploughed which resulted in further removal and destruction of native vegetation. Those observations were made on the western boundary but then south to a partlycleared area.

36 Mr Jaques travelled then to the eastern boundary of the property and south along the fence line to the southeastern corner of the property where he had seen clearing during his visit in September 2009. Within that area of the property he observed native vegetation regrowing within the area that had been previously cleared. That vegetation was up to one metre in height, consisting mostly of regrowing eucalypts. No further clearing work was apparent in that area since his previous site inspection on 30 November 2010. That evidence is relevant to confirm the evidence of Ms Waters to the effect that, if the previously cleared portion of the farming property had been left undisturbed, regrowth of native plants would have occurred.

37 Mr Jaques deposes that he had completed his inspection by about 12.45 pm. As he was leaving the property he met Mr ⇦ **Szulc** ⇨ at the property. He had a brief conversation with Mr ⇦ **Szulc** ⇨ regarding the entry provisions under the *Environmental Protection Act*. He told Mr ⇦ **Szulc** ⇨ that he had observed a further area of clearing in the south-west of the property. Mr ⇦ **Szulc** ⇨ replied by asking him if he had permission to be on the property. Mr Jaques replied to the effect that there were entry provisions in the *Environmental Protection Act* and offered to explain those provisions to Mr ⇦ **Szulc** ⇨. Mr ⇦ **Szulc** ⇨ said to Mr Jaques that he had read the Act and he did not think that Mr Jaques had any right to be on his property. He asserted that Mr Jaques would end up with a criminal record for trespass. Mr Jaques said that in his view he was authorised by the Act to inspect the property. Mr ⇦ **Szulc** ⇨ then asked the officers to leave, which they did.

38 Mr Jaques again used the GPS system to record the location of each photograph he had taken and then used GPS coordinates to produce a map showing the approximate locations where native vegetation had been cleared by ploughing the ground. Based on those observations, and using the coordinates, Mr Jaques confirms the estimate he made at the time of his visit to the effect that at least 40 ha of native vegetation had been cleared by burning and ploughing during 2011, and a map depicting the approximate location of the burnt and ploughed areas has been provided to the court by Mr Jaques.

39 Mr Jaques again undertook a search of all the records maintained by the Department of the Environment and Conservation in respect of clearing permits. Having searched those records, he states that he did not find any entry relating to any application for a clearing

permit being made or granted to Mr ⇦ **Szulc** ⇨ or any application for a clearing permit having been made or granted in respect of the property by any other person. I do not think it is necessary to refer to any of the other evidence relied upon by the CEO in relation to the third application.

40 I turn now to set out the conclusions which I draw from this evidence, and from the findings of fact which I have set out as a result of that evidence. It is clear beyond reasonable doubt from the findings of fact that I have set out that in each of the instances covered by the applications, land on the farming property has been cleared contrary to the orders which I made in 2009. The consequence of the earlier clearing had been of course to destroy native vegetation in the area that had been cleared. However, as Mr Jaques observed and as Ms Waters confirmed, and as the photographs themselves make clear, but for further clearing work, native vegetation would have regrown in the areas that had been previously cleared.

41 That regrowth has been prevented by the clearing work described in the affidavits of Mr Jaques and the other witnesses to whom I have referred. In relation to the second application, it is clear that some time prior to 30 November 2010 the area identified by Mr Jaques had been cleared. The question then is whether there is evidence from which I should conclude beyond reasonable doubt that the clearing was undertaken by Mr ⇦ **Szulc** ⇨.

42 It is clear from the observations of Mr Jaques made on that occasion that the clearing had been recently undertaken. The vegetation which he observed was still green and of course that reinforces his observation that the clearing work had only been recently undertaken. As I have noted, Mr ⇦ **Szulc** ⇨ was in custody until late October 2010, but was then released and he was present at the property at the time Mr Jaques inspected on 30 November 2010. Indeed, he demanded that Mr Jaques leave the property when Mr Jaques first attended and before Mr Jaques returned in the company of police.

43 As I have observed, the property is owned by Mr ⇦ **Szulc** ⇨ and in previous proceedings in this court, including in particular at the hearing on 26 July 2010, Mr ⇦ **Szulc** ⇨ gave evidence to the effect that he is the only person who lives at the property. On that occasion Mr ⇦ **Szulc** ⇨ admitted that he had been responsible for the clearing work that had been previously undertaken on the property and, as I have observed, he was present at the property when the inspection on 30 November 2010 occurred.

44 That material is, I think, sufficient for me to conclude beyond reasonable doubt that it was Mr ⇦ **Szulc** ⇨ who either undertook the clearing work or caused it to be undertaken. I also conclude that the alleged breach of the orders was wilful in the sense that I have described and could not be described as casual, accidental or unintentional. The terms of the orders were clear and had been made well known to Mr ⇦ **Szulc** ⇨ - he had already been imprisoned for breach of those orders. There is no doubt that he was aware of them. He was also no doubt aware of the likely consequences of breaching the orders, given the previous proceedings which had taken place.

45 The act of clearing already ploughed land, and in particular having regard to the areas involved, can only be consistent with deliberate intentional physical activity undertaken quite purposefully and wilfully by Mr **Szulc** or at his direction, I conclude that the second application is made out and I find Mr **Szulc** guilty of contempt as alleged in that application.

46 Turning then to the third application, it is also clear from the evidence that I have received that there was a substantial area of approximately 40 ha on the farming property that had been either burnt or ploughed or both some time between the inspection on 30 November and the subsequent inspection on 18 May 2011.

47 As with the second application it is clear that, but for the work that had been undertaken by ploughing and burning, native vegetation regrowth would have occurred in the areas that had been previously cleared and the consequence of the ploughing and burning was to destroy such regrowth as had already taken place and which is evident in the photographs and which was evident to Mr Jaques upon his inspection. I conclude and find that clearing work in contravention of the injunction was taken out by somebody.

48 Again I have to ask myself whether the evidence satisfies me beyond reasonable doubt that this work was undertaken or caused to be undertaken by Mr **Szulc**. Many of the same considerations as applied to the second application on this topic apply to the third application. Mr **Szulc** is the owner of the property, although his exwife's name is also on the title. He previously observed in evidence that he is the only occupant of the property. He has previously given evidence to the effect that he caused the previous clearing work to be undertaken, and although not present, or not at least evidently present at the time the officers arrived at the property on 18 May 2011, he was present on the property when the officers left the property on 18 May 2011 and had a conversation with those officers about their right to be there, in terms which made it clear that he was asserting exclusive possession and occupancy of the property.

49 All of those facts appear to me to be quite sufficient to establish beyond reasonable doubt that it was Mr **Szulc** who either ploughed and burnt the land or caused the land to be ploughed and burnt. For the same reasons as I gave in relation to the second application it is, I think, clear beyond doubt that the clearing work was undertaken wilfully and could not be characterised as casual, accidental or unintentional.

50 The orders were plainly known to Mr **Szulc**. As a result of the previous proceedings in this case he was aware of them. He had previously been punished for breaching them. The actions involved ploughing and burning, and the ploughing was certainly deliberate. Because only part of the land was burnt it seems likely that that was also a deliberate act, and the areas involved are substantial; a little over 40 ha made up of two separate areas. It seems highly unlikely that any of those things could have happened either accidentally or unintentionally.

51 For these reasons, I am satisfied beyond reasonable doubt that the work was undertaken by Mr **Szulc** wilfully or that he wilfully caused it to be undertaken. I find the third

application proven and I find Mr ⇦ **Szulc** ⇨ guilty of contempt as alleged.

Sentencing remarks

52 I turn now to deal with the penalties that should be imposed upon Mr ⇦ **Szulc** ⇨ for the two contempts of court which I have found to be established. I note first that I have previously sentenced Mr ⇦ **Szulc** ⇨ to a term of 3 months imprisonment as a result of the contempt which I found he had committed on what we have been calling the first application in the course of these proceedings.

53 In my reasons on that occasion, I set out the principles which I took to apply to govern the imposition of penalties for contempt of court. Since that decision, I have had occasion to address those principles in another case that I have decided, being ***Corruption and Crime Commission v Allbeury, Silvestro, Chikonga, Smith*** [No 2] [2011] WASC 26l; (2011) 205 A Crim R 386.

54 That decision was made in a very different context to the present case because it concerned a number of individuals who had refused to provide evidence to the Corruption and Crime Commission in the course of an investigation of organised crime. As will be apparent from the reasons which I gave, that context seemed to me to be particularly significant to the sentences which I was imposing in that case.

55 Nevertheless, some of the principles which I there enunciated are of more general application, including in particular the identification of the principles normally taken into account by a court when considering the punishment appropriately imposed for contempt of court and which are helpfully set out in the decision of Dunford J in ***Wood v Staunton [No 5]*** (1996) 86 A Crim R 183.

56 The general principles to be applied, in very short summary, are that contempt of court is the only remaining nonstatutory offence under the law of Western Australia and as a consequence, the punishment to be applied is purely a matter within the discretion of the court. The powers conferred upon that court are wide and flexible. The provisions of the *Sentencing Act 1995* (WA) and the *Sentence Administration Act 2003* (WA) do not apply to contempt, with the consequence that no question of parole or eligibility for parole arises, although the principles set out in s 6 of the *Sentencing Act* are nevertheless relevant.

57 Turning then to such of the factors that are identified by Dunford J in ***Wood v Staunton*** and which are relevant to this case, I deal firstly with the seriousness of the contempt proved. It is I think clear in these cases that the contempts that have been committed by Mr ⇦ **Szulc** ⇨ are very serious.

58 Amongst the reasons why they must be categorised as serious is the fact that they constitute two separate and distinct further breaches of the orders that I have made at times at which Mr ⇦ **Szulc** ⇨ was well aware of the consequences of breach as a consequence of his earlier conviction and incarceration.

59 Mr **Szulc** has placed himself in the position of a person who is flagrantly denying the administration of justice and the authority of the law. It follows that his conduct in flagrantly denying the authority of the law and the authority of this court must be denounced in an appropriately emphatic way.

60 Adding to the seriousness of the contempts that have been established are the fact that a conservation notice had been served upon Mr **Szulc**, a vegetation conservation notice had been served upon Mr **Szulc** and breach of those notices carry consequences in their own right.

61 The context in which these contempts were committed is also a factor which magnifies the seriousness of the contempts that have been proven. The *Environmental Protection Act* serves an important public purpose, a purpose which the community respects and expects the court, I am sure, to enforce by strong action.

62 The provisions of the *Environmental Protection Act* which were invoked by the CEO in this case and which gave rise to the clearing injunction are important provisions which protect native vegetation and in particular, vegetation that might protect and contain rare flora, or provide a habitat for rare fauna, or protect water courses, or prevent soil erosion. Even though the areas cleared by Mr **Szulc** in breach of the injunction had previously been cleared unlawfully, the evidence establishes that if clearing work ceases, there is a good prospect of substantial native vegetation regrowth. The actions of Mr **Szulc** have delayed that regrowth.

63 All of these things are important public interest considerations. The reasons for the contempts committed are not known but it is clear, as I have already observed, that they were deliberate and intentional contempts. One of the important sentencing considerations that is to be taken into account when breaches of legislation for the protection of the environment are concerned is that it is very likely in such cases that the breaches will have been wilful, deliberate, premeditated and undertaken for commercial advantage.

64 In many other areas of the law courts constantly see offenders who have breached the law by actions that are spontaneous, ill considered, not premeditated, or which were occasioned by intoxication or stupefaction or some other transient weakness of personality. Breaches of the environmental law are commonly not of that kind, and certainly the breaches which have been committed by Mr **Szulc** on this occasion are not of that kind.

65 As I have said, I have no evidence as to precisely why Mr **Szulc** did what he did on these occasions, but I think it is possible to draw inferences, at least for the purpose of sentence, from the fact that Mr **Szulc** is a farmer and the property is a farming property. Obviously Mr **Szulc** saw advantage to be gained from the clearing of that property, presumably in order that he could use it for farming purposes. Therefore I conclude that Mr **Szulc** has undertaken a deliberate and calculated breach of the law, and committed a contempt of the court in order to obtain commercial gain or benefit. That magnifies the seriousness of the contempts which have been established against him.

66 The second factor identified in ***Wood v Staunton*** that is relevant to this case is whether the contemnor was aware of the consequences to himself of what he did. There can be no doubt in this case that Mr ⇦ **Szulc** ⇨ would have been only too well aware of the likely consequence of his contravention, he having been only recently released from prison at the time of the contravention the subject of the second application.

67 The next factor is the actual consequences of the contempt. The consequences of the two contempts in this case have been that areas totalling a little over 60 ha of land that had already been cleared, and in respect of which regrowth would have occurred, have now again been desecrated, thus deferring the regrowth on that land. Another factor relevant to this case is the reason for the contempt, and I have already set out my findings on that subject.

68 Relevant also are questions of whether there has been any apology or public expression of contrition. There is no evidence in this case nor any suggestion of any apology or public expression of contrition. On the contrary, Mr ⇦ **Szulc** ⇨ by his conduct has displayed contempt (in the broad sense of that term) for the authority of the court and the authority of the law.

69 Character and antecedents of the contemnor are relevant. I have no evidence on that subject or submissions, so I proceed on the assumption that, aside from his previous conviction for contempt, Mr ⇦ **Szulc** ⇨ is a person of otherwise good character.

70 General and personal deterrence are I think particularly significant factors in this case. General deterrence is significant, as I observed on the last occasion, because it has to be made clear to people in Mr ⇦ **Szulc** ⇨'s position that orders made by this court for the protection of the environment are orders which must be obeyed, that the court will not countenance breaches of this kind, and will punish breaches of the orders of the court that are made for the purpose of the protection of the environment severely. General deterrence is of particular significance in cases like these in which unlawful conduct having an adverse effect upon the environment has been undertaken deliberately, with knowledge of its illegality, for the purpose of commercial gain or benefit. In cases like this, the punishment imposed must be such as to discourage others from taking the risk that their unlawful conduct will not be detected.

71 Personal deterrence has become a very significant factor in this case. There are now three separate occasions upon which Mr ⇦ **Szulc** ⇨ has been convicted of contempt by breaching the orders that I made and of which he was aware. It must be made clear to Mr ⇦ **Szulc** ⇨ that he must obey the law and must obey the authority of the court. Previous attempts to make Mr ⇦ **Szulc** ⇨ aware of that have failed and it follows that further attempts must be made by the imposition of greater terms of punishment.

72 Finally, the case of ***Wood v Staunton*** recognises the importance of denouncing the contempt that has been committed. I have already made reference to that factor. Because these are the second and third contempts committed by Mr ⇦ **Szulc** ⇨ it is I think entirely

appropriate that the court denounce emphatically the conduct which he has committed and show the court's disapproval of that conduct by the sentences to be imposed.

73 Although not strictly required to do so by the *Sentencing Act*, I have of course given consideration to the question of whether any sentence other than an immediate term of imprisonment would be appropriate. I have no hesitation in concluding that such a sentence would not be appropriate. Mr ⇦ **Szulc** ⇨ has previously been sentenced to imprisonment for the first contempt of which he was convicted and it is clear for all the reasons I have indicated that greater terms of imprisonment must be imposed upon Mr ⇦ **Szulc** ⇨ in order to reinforce to him his obligation to comply with the law.

74 I will now pass sentence. Mr ⇦ **Szulc** ⇨, would you stand up please. Mr ⇦ **Szulc** ⇨, for the offence of contempt of court the subject of the second application, that is for the offence committed some time between late October and late November 2011, I sentence you to 9 months imprisonment. For the offence of which I found you guilty the subject of the third application, that is the contempt committed between 30 November and 18 May 2011, I sentence you to 15 months imprisonment. Because of the totality principle I will order that those sentences be served concurrently, so the net effect is that you will be sentenced to 15 months imprisonment.

75 I take into account the fact that because the *Sentencing Act* and *Sentencing Administration Act* do not apply, there is no prospect of parole for those offences, so you will be sentenced to 15 months imprisonment.

[2017] WASC 162

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	THE STATE OF WESTERN AUSTRALIA -v- GALATI [No 4] [2017] WASC 162
CORAM	:	TOTTLE J
HEARD	:	8 JUNE 2017
DELIVERED	:	16 JUNE 2017
FILE NO/S	:	CIV 2545 of 2015
BETWEEN	:	THE STATE OF WESTERN AUSTRALIA Plaintiff AND ANTONIO GALATI First Defendant GALATI NOMINEES PTY LTD Second Defendant

Catchwords:

Contempt - Civil contempt - Penalty - Where contempt admitted - Seriousness of the breach considered - Where defendants making substantial contribution to plaintiff's costs - Where defendants have made public apology in newspaper

Legislation:

Civil Judgments Enforcement Act 2004 (WA), s 97, s 98
Marketing of Potatoes Act 1946 (WA), s 28
Marketing of Potatoes Amendment and Repeal Act 2016 (WA), s 46, s 49(1)
Sentencing Act 1995 (WA), s 6

[2017] WASC 162

Result:

The first defendant be fined $7,500
The second defendant be fined $32,500

Category: B

Representation:

Counsel:

Plaintiff	:	Mr P D Quinlan SC & Ms B M Allen
First Defendant	:	Mr J C Giles SC & Mr P van der Zanden
Second Defendant	:	Mr J C Giles SC & Mr P van der Zanden

Solicitors:

Plaintiff	:	State Solicitor for Western Australia
First Defendant	:	Hotchkin Hanly Lawyers
Second Defendant	:	Hotchkin Hanly Lawyers

Case(s) referred to in judgment(s):

Allbeury v Corruption and Crime Commission [2012] WASCA 84
Attorney-General (NSW) v MacQuarie Publications Pty Ltd (1988) 40 A Crim R 405
Attorney-General v Times Newspapers Ltd [1974] AC 273
Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98
Caratti v Boban Pty Ltd (Administrators Appointed) [No 2] [2015] WASC 139
Chief Executive Officer, Department of Environment and Conservation v Szulc [No 2] [2011] WASC 315
Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd [2003] FCAFC 13; 196 ALR 350
Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2015] HCA 21; (2015) 256 CLR 375
Kennedy v Lovell [2002] WASCA 226
Potato Marketing Corporation of Western Australia v Galati [2015] WASC 430
R v Giscombe (1984) 79 Cr App R 79
R v Pearce (1992) 7 WAR 395

Re Colina; Ex parte Torney [1999] HCA 57; (1999) 200 CLR 386
Thunder Studios Inc (California) v Kazal (No 2) [2017] FCA 202
Witham v Holloway (1995) 183 CLR 525
Wood v Staunton [No 5] (1996) 86 A Crim R 183

TOTTLE J:

Summary

1 Galati Nominees disobeyed an order made by the court on 11 November 2015.[1] It admits this disobedience means that it is guilty of a contempt of court for which it should be punished. By disobeying the order Galati Nominees obtained a commercial benefit in the form of revenue of approximately $148,000.

2 Mr Galati was a director of Galati Nominees when it disobeyed the order and he admits that he is guilty of a contempt of court for which he should be punished.

3 The law of contempt of court protects the public interest in the due administration of justice, that is, the resolution of disputes by adjudication in the courts. Orders made by the courts give effect to decisions made by applying the law that governs all members of society to disputes brought before the courts. The authority of the courts and ultimately the rule of law are undermined if court orders are not obeyed. Those bound by court orders must understand that they cannot be disobeyed with impunity.[2]

4 Acknowledging these important principles, the defendants have apologised unreservedly to the court and, on 9 June 2017, published a statement in The West Australian newspaper recording their apology and their acceptance that the court's orders must be obeyed without exception. I have decided that Galati Nominees should be punished for its contempt by the imposition of a fine of $32,500 and that Mr Galati should be punished for his contempt by the imposition of a fine of $7,500.

5 The defendants have agreed to pay $200,000 towards the plaintiff's costs of the contempt proceedings.

Agreed facts

6 The parties agreed a statement of the facts which should be taken into account by me in determining the penalties to be imposed on the defendants. The facts are as follows.

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[1] In these reasons I will refer to the first and second defendants as the defendants unless it is necessary to refer to them individually, in which case I will refer to them as Mr Galati and Galati Nominees, respectively.

[2] ***Attorney-General v Times Newspapers Ltd*** [1974] AC 273 [315] (Lord Simon of Glaisdale); ***Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*** (1986) 161 CLR 98, 107; ***Thunder Studios Inc (California) v Kazal (No 2)*** [2017] FCA 202 [4] (Rares J).

7 In November 2015 Mr Galati was a commercial producer of ware potatoes and Galati Nominees was a merchant, appointed by the Potato Marketing Corporation of Western Australia (the Corporation), to receive delivery of ware potatoes on behalf of the Corporation from persons, such as Mr Galati, who were authorised by it to carry on business as commercial producers. Galati Nominees sold the ware potatoes delivered to it by Mr Galati.

8 The Domestic Marketing Pool 2 of the 2015/2016 season established under the *Marketing of Potatoes Act 1946* (WA) comprised the period 4 October 2015 to 2 January 2016 (Pool 2).

9 The Corporation issued Mr Galati a certificate of domestic market entitlement for Pool 2 which entitled him to deliver a total of 1,049 tonnes of potatoes during Pool 2.

10 On 11 November 2015 I made the following order:

> Until further order [Galati Nominees] is restrained from, either directly or indirectly, selling ware potatoes in excess of the domestic market entitlement of a total of 1,049 tonnes allocated by [the Corporation] to [Mr Galati] pursuant to section 28 of the *Marketing of Potatoes Act 1946* (WA) for the period from 4 October 2015 to 2 January 2016.

11 The order was served personally on Mr Galati on 24 November 2015. This constituted service on Galati Nominees.

12 Mr Galati was also present in court when the order was made and both he and Galati Nominees had knowledge of the terms and substance of the order that was clear, unambiguous and capable of compliance.

13 In breach of the order, Galati Nominees sold 150 tonnes of ware potatoes in excess of the domestic market entitlement of 1,049 tonnes allocated by the Corporation to Mr Galati for Pool 2.

14 The breach was deliberate, that is, not accidental, and it was voluntary.

15 Both defendants knew of the sale of 150 tonnes of ware potatoes in excess of the domestic market entitlement of 1,049 tonnes allocated by the Corporation to Mr Galati for Pool 2.

16 Galati Nominees received an average sale price of $990 per tonne for the ware potatoes it sold in breach of the order. This figure did not represent the net financial benefit per tonne received by Galati Nominees

resulting from the breach as it had to meet certain overheads and variable costs, such as casual labour, transport, packaging and distribution costs.

17 The pleas of guilty and the agreement as to facts have resulted in savings in court time and trial costs.

18 In addition to their contribution of $200,000 to the plaintiff's costs the defendants have paid their own costs of the proceedings.

19 The defendants have no prior convictions for contempt.

Procedural matters

20 The application comes before the court by way of a notice of motion filed on 1 June 2016 and amended on 24 August 2016. In the amended notice of motion, the Corporation alleged that Galati Nominees should be found guilty of contempt by reason of its disobedience of the order and that Mr Galati, as a director of Galati Nominees, be found guilty of contempt pursuant to s 98(3) of the *Civil Judgments Enforcement Act 2004* (WA).

21 The Corporation was abolished on 31 December 2016 and its assets and rights were vested in the State of Western Australia.[3] On 16 January 2017, I ordered that the State of Western Australia be substituted as the plaintiff in place of the Corporation.

Contempt - the legal principles

22 Division 2 of the *Civil Judgments Enforcement Act* applies if a judgment requires or has the effect of requiring a person to not do an act, to cease doing an act, or to do an act other than to pay money or to give possession of any real or personal property to another person.[4]

23 'Judgment' is defined in s 3 of the *Civil Judgments Enforcement Act* to include an order of a court that requires or has the effect of requiring a person to do an act, or not do an act, or cease doing an act. Accordingly, the order is a judgment for the purposes of div 2 of the *Civil Judgments Enforcement Act.*

24 Section 98(3) of the *Civil Judgments Enforcement Act* provides:

> If a corporation disobeys a judgment to which this Division applies, the corporation is guilty of a contempt of court, and each officer of the

[3] *Marketing of Potatoes Amendment and Repeal Act 2016* (WA) s 46 and s 49(1).
[4] *Civil Judgments Enforcement Act 2004* (WA) s 97.

corporation is also guilty of a contempt of court unless he or she satisfies the court -

(a) that the corporation's disobedience occurred without the officer's consent or connivance; and

(b) that the officer took all the measures to ensure the corporation obeyed the judgment that he or she could reasonably be expected to have taken having regard to the officer's functions and to all the circumstances.

25 The requirements for proof of a punishable contempt of court are as follows:

(i) an order was made by the court;

(ii) the terms of the order were clear, unambiguous and capable of compliance;

(iii) the order was served on the contemnor or service was dispensed with;

(iv) the contemnor has knowledge of the terms of the order;

(v) the contemnor has breached the terms of the order; and

(vi) the act or omission which constituted the breach of the order was deliberate and voluntary.[5]

26 Deliberate disobedience of an order does not require a specific intention to break the law or even knowledge on the part of the contemnor that the relevant conduct constituted a breach. It is sufficient that the contemnor was aware of the facts that make their conduct a breach of the order. In the context of contempt, 'deliberate' means wilful in the sense that the actions of the contemnor were not casual, accidental or unintentional.[6]

27 Disobedience of a court order constitutes a civil contempt although where the disobedience involves deliberate defiance, that is, where the disobedience can be described as contumacious, it may constitute a

[5] ***Caratti v Boban Pty Ltd (Administrators Appointed) [No 2]*** [2015] WASC 139 [19] - [21], [86] - [88] (Mitchell J, as his Honour then was).
[6] ***Chief Executive Officer, Department of Environment and Conservation v Szulc [No 2]*** [2011] WASC 315 [8] (Martin CJ); cf ***Caratti*** [82] - [84].

criminal contempt. The distinction between criminal and civil contempt is, however, blurred and has been described as illusory.[7]

Defendants are guilty of contempt

28 On the basis of the admissions made by them, each defendant is guilty of contempt of court.

29 As a director of Galati Nominees, Mr Galati's guilt flows from Galati Nominees' disobedience of the order and his inability to satisfy the court that:

(i) such disobedience occurred without his consent or connivance; and

(ii) he took all the measures that he could reasonably be expected to have taken having regard to his functions and circumstances to ensure that Galati Nominees obeyed the order.

Principles applicable to determination of penalty

30 The question of punishment for contempt is a matter that is within the discretion of the court.[8]

31 The *Sentencing Act 1995* (WA) does not apply as a matter of law to punishment for contempt of court but it is appropriate to have regard to the principles of sentencing set out in s 6 of the *Sentencing Act*.[9]

32 The cardinal feature of the power to punish for contempt is that it is an exercise of judicial power by the courts to protect the due administration of justice.[10]

33 In ***Mudginberri***, the majority emphasised that the underlying rationale of the exercise of the power to punish for contempt was that it was necessary to uphold and protect the efficient administration of justice

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[7] ***Witham v Holloway*** (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ), cited with approval in ***Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*** [2015] HCA 21; (2015) 256 CLR 375 [42] (French CJ, Kiefel, Bell, Gageler and Keane JJ), [66] (Nettle J). The distinction was described as being of an 'unsatisfactory nature' in ***Mudginberri*** (107) (Gibbs CJ, Mason, Wilson and Deane JJ).

[8] ***R v Pearce*** (1992) 7 WAR 395, 431 (Malcolm CJ, with Pidgeon and Rowland JJ agreeing).

[9] ***Kennedy v Lovell*** [2002] WASCA 226 [6] (Malcolm CJ, with Murray and Steytler JJ agreeing).

[10] ***Re Colina; Ex parte Torney*** [1999] HCA 57; (1999) 200 CLR 386, 429 [112] (Hayne J), cited with approval in ***Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*** [41] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

by demonstrating that the court's orders will be enforced. The majority cited the following passage from *Borrie and Lowe's Law of Contempt*:[11]

> If a court lacked the means to enforce its orders, if its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.

34 In ***Wood v Staunton [No 5]***,[12] Dunford J set out a number of matters relevant to the assessment of the proper punishment for a contempt constituted by a refusal by a witness at a Royal Commission to answer questions put to him. Expressed in more general terms than those used by Dunford J the relevant matters are as follows:

(i) the nature and seriousness of the contempt proved;

(ii) the consequences of the contempt;

(iii) the context in which the contempt was committed;

(iv) the reason for the contempt including whether the contemnor intended subjectively to commit the contempt;

(v) any benefit received by the contemnor;

(vi) whether there has been any apology or public expression of contrition;

(vii) the circumstances, character and antecedents of the contemnor;

(viii) general and personal deterrence; and

(ix) denunciation of the contempt.

35 The absence or presence of a prior conviction for contempt,[13] but not other criminal history,[14] is relevant.

36 The great variation in the facts and circumstances of offences of contempt and contemnors precludes the establishment of a tariff or a sentencing range.[15]

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[11] ***Mudginberri*** (107), citing *Borrie and Lowe's Law of Contempt* (2nd ed, 1983) 3. This passage also appears in the more recent version of the text: I Cram (ed), *Borrie and Lowe: The Law of Contempt* (4th ed, 2010) 6.
[12] ***Wood v Staunton [No 5]*** (1996) 86 A Crim R 183, 185.
[13] ***Attorney-General (NSW) v MacQuarie Publications Pty Ltd*** (1988) 40 A Crim R 405, 410 (Kirby ACJ, with Hope AP and Mahoney JA agreeing).
[14] ***R v Giscombe*** (1984) 79 Cr App R 79, 84.
[15] ***Allbeury v Corruption and Crime Commission*** [2012] WASCA 84 [251] (Buss JA, as his Honour than was, with McLure P and Mazza JA agreeing).

37 The burden imposed on a contemnor by an adverse costs order may be taken into account when determining the penalty for contempt. In some instances an adverse order for costs may be considered by a court as a sufficient sanction for contempt.[16]

38 I will now set out how the principles to which I have referred apply to the contempt committed by the defendants.

Seriousness of the contempt, its context, the reason for it and benefit received

39 The context in which the order disobeyed by Galati Nominees was made is relevant to my assessment of the seriousness of the contempt.

40 The order was made to restrain breaches of the regulatory scheme for the production and marketing of potatoes established by the *Marketing of Potatoes Act 1946*. As recorded in the reasons for making the order, Mr Galati had stated that unless restrained Galati Nominees would sell potatoes in excess of his Pool 2 Domestic Market Entitlement.[17] One of the factors taken into account in assessing where the balance of convenience lay was the public interest, about which I stated:[18]

> I am satisfied that there is a real danger that if Galati Nominees is not restrained from selling potatoes grown by Mr Galati in excess of his relevant DMEs, the Corporation will not be able to regulate the market for potatoes effectively and in accordance with the Act. There is a real risk that other growers and merchants who have operated in compliance with the Act will follow Mr Galati's lead and operate without regard to the provisions of the Act. This carries with it the risk of disorderly de facto deregulation. If there is to be deregulation, this must be achieved in accordance with a timetable and in a manner specified by the State Government and Parliament. In my view, these factors highlight that damages would not be an adequate remedy and that the balance of convenience favours the grant of relief.
>
> I should add that the public interest (in the widest sense) suffers if a scheme established by law is contravened by persons who decide unilaterally that the scheme should not apply to them. In essence, this is the position taken by Mr Galati and Galati Nominees. The aspect of the public interest to which I have just adverted is thus a factor that favours the grant of an injunction.

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[16] ***Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd*** [2003] FCAFC 13; 196 ALR 350 [7] - [13] (Moore J, with Tamberlin and Goldberg JJ agreeing).
[17] ***Potato Marketing Corporation of Western Australia v Galati*** [2015] WASC 430 [109].
[18] ***Potato Marketing Corporation of Western Australia v Galati*** [124] - [125].

41 By referring to these passages in the reasons for making the order I am not to be taken as determining the seriousness of the breach on the basis that the defendants acted in defiance of the order, that is, that the contempt was contumacious. The facts that have been agreed do not permit such a finding to be made. The contravening sale of potatoes was deliberate in the sense to which I have referred earlier: it was not casual, accidental or unintentional.

42 The defendants accepted the breach of the order was serious and that it was not a 'technical' breach. In my view, this was a proper concession to make. The breach of the order was serious for the following reasons.

43 First, the object of the order was not confined to the preservation of private rights but was made to uphold those aspects of the public interest identified in the passages of the reasons for making the order cited above. Mr Galati, and thus Galati Nominees, knew that the order was made in part to protect the public interest and this should have reinforced the importance of ensuring that the order was obeyed.

44 Second, as the defendants acknowledge, the breach was not a trivial breach. A significant tonnage of potatoes was sold in breach of the order. Galati Nominees derived substantial revenue from the infringing sales.

45 Third, directors of a company which is subject to a court order enjoining it either to perform an act or to refrain from doing a particular act bear a heavy responsibility to ensure that the company complies with the order. In this case, Mr Galati has accepted, in effect, that he did not take all the measures that he could reasonably have been expected to take, having regard to his position within Galati Nominees, to ensure Galati Nominees obeyed the order. No explanation has been offered as to how the breach of the order was allowed to occur. In circumstances in which it must have been obvious to Mr Galati that it was important that the order be obeyed, his failure to ensure that it was obeyed is an omission deserving of punishment.

46 The defendants accept that it is proper to view the acts constituting the breach of the order as done for the purposes of obtaining commercial benefit. The significant revenue received by Galati Nominees does not represent the net financial benefit derived by it from the breach of the order, but Galati Nominees has not provided any information from which an estimate of the net financial benefit might be made. Indeed, no information about the defendants' financial circumstances has been provided.

47 The agreed facts do not permit me to make specific findings as to any consequences that flowed from the breach other than as to the revenue derived from the breach by Galati Nominees.

Deterrence and denunciation

48 The need to deter others from disobeying court orders and the need to denounce disobedience of court orders feature prominently in exercising the sentencing discretion for this form of contempt of court. As I have already emphasised, litigants and others to whom court orders are addressed must understand that orders of the court cannot be disobeyed with impunity.

49 It is accepted by the plaintiff that the imposition of a sentence of imprisonment on Mr Galati is not warranted.

50 In cases in which disobedience to a court order has generated a financial gain to the contemnor, the interests of general deterrence require the imposition of a financial penalty that ensures the contemnor does not profit from the contempt. Mr Giles SC accepted this general proposition on the defendants' behalf, but argued that in this case the benefit received by Galati Nominees has been stripped from it by its agreement to pay $200,000 to the plaintiff in respect of the costs of the contempt proceeding. It was also submitted that the payment by the defendants of $200,000 towards the plaintiff's costs would be regarded by the public as part of the sanction for contempt and would have a significant deterrent effect. I deal with the significance to be attached to the payment of $200,000 towards costs later in these reasons.

51 I accept that the apology published in The West Australian newspaper serves the interests of general deterrence.

52 Personal deterrence is not a relevant factor in the determination of the penalty in this case. Neither defendant has any prior convictions for contempt of court. The dispute that generated the application for the order and the making of the order has been resolved. It is unlikely that there will be any repetition of the circumstances that led to the order and thus there is no need to deter the defendants personally from committing contempts of court in the future.

Guilty pleas and the apologies

53 The hearing of the contempt motion was listed for seven days. The plaintiff's case rested upon circumstantial evidence and 19 affidavits had

been filed and served by the plaintiff. The plaintiff had also filed and served comprehensive written submissions.

54 The defendants' admissions and guilty pleas came after the plaintiff had incurred the expense of preparing its case and this is reflected, in part at least, by the defendants' agreement to pay $200,000 to the plaintiff in respect of costs.[19] It is a substantial payment.

55 The utilitarian benefit of the defendants' admissions and guilty pleas is, however, a mitigating factor. The further costs of a seven-day hearing have been avoided and the court has been able to utilise the time that the hearing would otherwise have occupied. I will reduce the fines that I would otherwise have imposed in recognition of the utilitarian benefit of the admissions.

56 I accept that the apology made to the court by Mr Giles SC on behalf of the defendants in the presence of Mr Galati, and the apology published in The West Australian newspaper, taken with the admissions and guilty pleas, is evidence of remorse on Mr Galati's part. As noted earlier, the publication of an apology in a newspaper assists in conveying the message to the public that court orders must be obeyed.

The significance of the payment of $200,000 towards the plaintiff's costs

57 Mr Giles submits that the publication of the apology and the liability to pay the plaintiff's costs constitute sufficient punishment for Mr Galati. For the same reasons he submits that any fine imposed on Galati Nominees should be modest.

58 I accept that the payment of $200,000 towards the plaintiff's costs ensures that Galati Nominees has not profited from its breach of the order. I also accept that the payment of this sum contributes to general deterrence. I have taken those matters into account in determining the fines.

59 In my view, however, the mitigation to be derived from the contribution to costs is not to be accorded the weight for which the defendants contend for three reasons.

60 First, by making the payment of $200,000 towards costs the defendants are bearing a burden they created. The same observation may be made about the costs incurred by the defendants with their own lawyers. If the defendants had made their admissions at the

[19] This payment does not reflect an agreement to pay costs on an indemnity basis.

commencement of the contempt proceeding (as implicitly they acknowledge they should have done), the significant costs burden they incurred would have been avoided.

61 Second, although a costs order in favour of the successful party in a contempt motion may be regarded as part of the sanction for contempt, the primary object of a costs order is to enable a successful party to recoup some or all of its expenditure on legal costs from the unsuccessful party, whereas in punishing a party who has disobeyed a court order which no longer has operative effect,[20] the court is concerned to protect the effective administration of justice by imposing a penalty which discourages others from disobeying orders in the future. The purpose of the imposition of a penalty is not limited to ensuring that a contemnor does not benefit from the contempt.

62 Third, for the reasons given above the disobedience of the court order was serious, if the court was not to impose a fine on Mr Galati and only impose a modest fine on Galati Nominees, this may be perceived as diminishing the seriousness of the contempt thereby undermining the object of imposing a penalty.[21]

Determination of the fines

63 In determining the fines I have taken into account the matters to which I have referred in these reasons. I wish to emphasise that whilst the remorse evidenced by the guilty pleas and apologies, and the disgorging of the benefit obtained by Galati Nominees by the payment of the plaintiff's costs, are factors that favour leniency, substantial fines are required to ensure that the due administration of justice is protected and that is why I have determined that the appropriate fines to impose are a fine of $32,500 on Galati Nominees and a fine of $7,500 on Mr Galati.

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[20] In contrast to those cases in which the court is exercising its contempt powers to secure obedience to an order.
[21] See ***Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd*** [53] (Tamberlin and Goldberg JJ).

[2022] WASC 370

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	:	YAP -v- MATIC [No 3] [2022] WASC 370
CORAM	:	SOLOMON J
HEARD	:	12 APRIL & 27 OCTOBER 2022
DELIVERED	:	27 OCTOBER 2022
PUBLISHED	:	1 NOVEMBER 2022
FILE NO/S	:	CIV 1106 of 2022
BETWEEN	:	VIVIEN JIT SIEN YAP First Plaintiff EMPIRE SONS (AUSTRALIA) PTY LTD T/AS RAY WHITE (DALKEITH CLAREMONT) Second Plaintiff AND SANDI MATIC Defendant

Catchwords:

Contempt of court – Breach of court orders – Whether conduct amounted to a breach – Turns on own facts

Legislation:

Nil

Result:

Defendant guilty of contempt

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr M L Bennett
Second Plaintiff	:	Mr M L Bennett
Defendant	:	No appearance

Solicitors:

First Plaintiff	:	Bennett
Second Plaintiff	:	Bennett
Defendant	:	No appearance

Case(s) referred to in decision(s):

Yap & Anor v Matic [2022] WASC 181

SOLOMON J:

(This judgment was delivered extemporaneously on 27 October 2022 and has been edited from the transcript)

1 This is an application brought by the first plaintiff in respect of an allegation of contempt by reason of the defendant, Sandi Matic's, alleged breach of the orders of the court.

2 The application for contempt was initially made by chamber summons on 22 March 2022. On 12 April 2022, I heard the application for contempt and I published reasons on 23 May 2022 (the May Reasons).[1] These reasons should be read and understood together with that decision.

3 The relevant orders said to be breached are those made by the court on 11 February 2022. They are set out at [15] of the May Reasons, and in particular, order 1(iv) of those orders, which provided that:

> The defendant is restrained and an injunction is granted restraining the defendant, until further order of the court, from threatening the first plaintiff.

4 In the May Reasons, I set out my consideration of the first plaintiff's application for contempt by the defendant, Sandi Matic. As is explained, the first plaintiff's chamber summons identified three instances of alleged contempt. However, by reason of a deficiency in the chamber summons, I could not find in favour of the first plaintiff. Additionally, I was not prepared to entertain an application for leave to amend the application in respect of the first and third instances of alleged contempt, but I did leave open the possibility of a further consideration of the application in respect of the second instance.

5 The second instance concerns an email sent by Mr Matic to the first plaintiff's solicitors, Bennett + Co (as they then were) on 16 March 2022. The relevant content of that email, to which I shall return, is set out at [164] of the reasons of the May Reasons.

6 After publication of the May Reasons, the first plaintiff applied to amend the application to cure the deficiency in the summons. There were various directions hearings relating, at least in part, to that application. The outcome of those hearings was that the first plaintiff

[1] ***Yap & Anor v Matic*** [2022] WASC 181.

was given leave to amend the application to cure that deficiency, and orders were made that the application for contempt would be heard on the basis of the amended application.

7 The amended application was filed and served on 5 August 2022, and that is the application presently before me.

8 It is not necessary to provide all the detail in respect of communication with the defendant, Sandi Matic. It suffices, for present purposes, to record that Sandi Matic was given repeated and ample opportunity to respond to the application and was also advised more than once of this listing. It is plain that he was aware of today's hearing, because he responded on two occasions to the notification of the listing of today's application. In those circumstances, although the defendant has failed to appear, I am satisfied that he was aware of the hearing and that the application should proceed in his absence.

9 As explained in the May Reasons, the authorities establish that the elements of contempt to be satisfied beyond reasonable doubt are:

(a) there must have been an order of the court;

(b) the terms of the court's order must be clear, unambiguous and capable of compliance;

(c) the order must have been served on the defendant;

(d) the defendant must have had knowledge of the order;

(e) the defendant must have breached the order; and

(f) the act constituting the breach must have been deliberate and voluntary. This does not require a conscious intention to break the law. Deliberate means the conduct was not casual, accidental, or unintentional.

10 In this application, the real question is whether the first plaintiff has established beyond reasonable doubt that the alleged conduct took place, and whether that conduct constituted a threat to Ms Yap, and therefore a breach of the order. As explained in my judgment of 23 May 2022, the other elements are, plainly, satisfied beyond reasonable doubt.

11 I turn now to the question of whether the conduct took place, and whether it amounted to a threat to Ms Yap. In that context, I return to

the content of the email of 16 March 2022. The relevant part of that email reads as follows:

> For one final time, I would request that your client stops telling lies about me if they don't want me telling the truth about them.
>
> I urge you to assess the matters at hand impartially & advise your client that it is in their best interests to get this ridiculous matter dropped before I start issuing subpoenas for production of documents & access to email correspondence and submitting freedom of information requests to The Australian Health Practitioner Regulation Agency (AHPRA) to demonstrate to the courts that this sort of illegal & criminal behaviour started long before Ms Yap and I crossed paths.
>
> Along with sworn affidavits from ex employee's (sic) detailing ongoing unethical & illegal practices, misleading & lying to clients I don't see how even a highly respected & accomplished lawyer like yourself could possibly get the judge to look the other way and ignore the mounting evidence showing a lifetime of corruption.
>
> I am prepared to risk it all & lose everything I've got to see this through to the end even if it means that it will all be to me (sic) detriment.

12 Mr Matic has been given ample opportunity to explain why those words should not be construed as a threat. At [165] of the May Reasons, I set out Mr Matic's response to why, in his view, those matters did not amount to a threat.

13 Mr Matic was also, by reason of my orders dated 11 August 2022, given a further opportunity to put material before the court in relation to the contempt application. No such material was filed.

14 It is plain that Ms Yap did regard that email and its contents as threatening. In her second affidavit of 25 March 2022, Ms Yap gave sworn evidence about the very significant impact of the email on her life, her health, and her anxiety.

15 The question arises as to whether it is sufficient to show that a defendant subjectively perceived a communication to be a threat, or whether it is necessary for the court, objectively, to assess the conduct as a threat. That is not a question that I need to resolve on this occasion, because in my view it is plain that the email of 16 March 2022 on any version, and objectively speaking, constituted a threat. It appeared to be advanced by the defendant in an effort to intimidate Ms Yap to drop the proceedings, lest she encounter unpleasant consequences that are, in a very thinly veiled manner, referred to in that

email. The defendant makes references to illegal and criminal behaviour without foundation, including 'illegal practices', 'lying' and 'a lifetime of corruption', and he makes explicit threats to expose all that. In particular, in the final paragraph, Sandi Matic says that he is prepared to risk it all and lose everything, even if it is to his detriment. In the context of this dispute and on any ordinary sensible construction, this is a very menacing threat to any ordinary person. The explanations provided by Sandi Matic and set out in the May Reasons are unpersuasive, and I reject them.

16 In the circumstances, therefore, I am persuaded beyond reasonable doubt that Sandi Matic breached the order made by the court on 11 February 2022. In that respect, I am satisfied that the defendant, Sandi Matic, is guilty of contempt.

17 Counsel for the first plaintiff has informed me that his office has received, and I am aware that the court has received, various correspondence from the defendant indicating that Sandi Matic continues to reject, at least in some respects, the authority of the court to regulate his conduct. Counsel for the first plaintiff has also drawn my attention to a number of authorities which establish the applicable principles in respect of the appropriate penalty that the court is empowered to impose in the circumstances. Those matters are relevant to the question of the appropriate sanction.

18 Given that Sandi Matic did not appear today, I do not consider it appropriate for the matter of penalty to be determined without giving him one further opportunity to appear and to make submissions as to the sanction to be imposed.

Orders

19 I thereby make the following orders.

1. The defendant, Sandi Matic, is guilty of contempt by reason of his breach of the court's orders dated 11 February 2022.

2. The penalty to be imposed shall be determined at a further hearing to be fixed by the court.

3. Costs be reserved.

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SOLOMON J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

IS
Associate to the Honourable Justice Solomon

1 NOVEMBER 2022